

STATE OF MONTANA  
BEFORE THE DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

IN THE MATTER OF APPLICATION  
FOR BENEFICIAL WATER USE  
PERMIT NO. 4492-s41B BY  
GARTH TAYLOR

FILMED  
APR 7 1990

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER

The Proposed Findings of Fact, Conclusions of Law, and Order in this matter as entered on April 5, 1976, by the Hearing Examiner, and the Addendum to Proposal for Decision as entered on April 14, 1976, by the Hearing Examiner, are hereby adopted as the Final Findings of Fact, Conclusions of Law, and the Final Order.

FINAL ORDER

1. Subject to the modifications, limitations, and the conditions imposed below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of a flow rate of no more than 1 cubic foot per second of water or 450 gallons per minute and not to exceed a total of 5 acre-feet per annum from an unnamed spring, a tributary of Murray Gilbert Slough, in Beaverhead County, Montana, from October 16 to March 31, inclusive, of each year. Said appropriation is to be impounded in a 5-acre-foot reservoir on said unnamed tributary at a point in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 30, Township 6 South, Range 8 West, M.P.M., and used for only recreational, wildlife, and if feasibly beneficial, fishpond purposes from January 1 to December 31, inclusive, of each year.

2. Water may not be appropriated pursuant to this permit during the irrigation season from April 1 to October 15, inclusive, of each year.

3. The permit is granted subject to all apparent prior existing water rights in the source of supply.

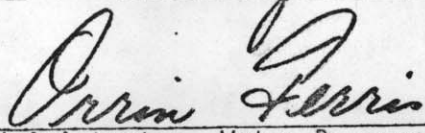
CASE # 4492

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring and flow-control devices to enable the Applicant to control and keep a record of all quantities of water diverted and returned, as well as the periods of such diversion and return. Such records shall be presented to the Department for inspection upon demand by the Department.

5. The Applicant shall specifically install and maintain adequate drainage devices so as to enable complete drainage of the reservoir into the main channel of the unnamed tributary of the Murray Gilbert Slough, at a point as close as possible to the original point of diversion.

6. This permit, granted in modified form only, is subject to any final determination of prior existing water rights in the source of supply as provided for by Montana law. Violation of any of the terms and conditions imposed herein shall constitute grounds to void the permit in its entirety.

Done this 24<sup>th</sup> day of May, 1976.

  
\_\_\_\_\_  
Administrator, Water Resources Division  
DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

NOTICE: Section 89-8-100, R.C.M. 1947, provides that a person who is aggrieved by a final decision of the Department is entitled to a hearing before the Board of Natural Resources and Conservation. A person desiring a hearing before the Board pursuant to this section must notify the Department in writing within ten (10) days of the final decision.

Address: Department of Natural Resources and Conservation  
Natural Resources Building  
32 South Ewing  
Helena, MT 59601

**CASE # 4492**



BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

-----  
IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     ) ADDENDUM TO PROPOSAL  
No. 4492-s41B by MR. GARTH TAYLOR     ) DECISION  
-----

This Addendum is intended for purposes of clarification and explanation only. It in no way alters the terms of the Proposed Order.

It originally was and remains the intention of the Hearing Examiner that Paragraph 3 of the Proposed Order is specifically meant to prohibit the Applicant from appropriating water pursuant to the Proposed Order at such times otherwise allowed in the Proposed Order, when such appropriation by the Applicant would adversely affect the prior existing water rights of a prior appropriator, even though such adverse effect would not result until after the applicant has ceased appropriating.

Thus, for example, and for exemplary purposes only, appropriation by the Applicant occurring in March is prohibited if such appropriation will have an adverse effect upon the prior existing water rights of a prior appropriator in April.

CASE # 4492

NOTICE

This is a Proposed Addendum and will not become final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Addendum, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exception, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 14<sup>th</sup> day of April, 1976.

Richard Gordon

RICHARD GORDON  
HEARING EXAMINER

CASE # 4492



BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

-----

IN THE MATTER OF APPLICATION	)	
FOR BENEFICIAL WATER USE	)	
PERMIT NO. 4492-s41B BY MR.	)	<u>PROPOSAL FOR DECISION</u>
GARTH TAYLOR.	)	

-----

Pursuant to the Montana Water Use Act and the Montana Administrative Procedure Act, after due notice, a hearing on objections to the above-described application was held in the multipurpose room of the Law Enforcement Building of the Beaverhead County Courthouse at Dillon, Montana, at approximately 2 p.m., on Monday, March 1, 1976, Richard Gordon, Hearing Examiner, presiding.

Neither the Applicant (Mr. Garth Taylor) nor a representative of the Applicant was present at the hearing to present evidence or testimony in support of the application, or to respond to the testimony presented by the Objectors. Prior to commencement of the hearing numerous attempts were made to locate the Applicant in order to determine whether or not the Applicant or a representative intended to appear. Such attempts to locate the Applicant proved unsuccessful.

Mr. T.J. Reynolds and Mr. Robert Decker appeared personally and presented evidence and testimony on behalf of the

CASE # 4492

Department of Natural Resources and Conservation. Mr. Reynolds offered into evidence one exhibit: a copy of a summary of Department of Natural Resources and Conservation records of water rights on the Murray Gilbert Slough. Said exhibit was numbered and entered as Department Exhibit No. 1.

Mr. Carl J. Meine, an Objector, appeared was not present but was represented by counsel, John W. Whelan, Esq., of Butte, Montana. Additionally, Mrs. Carl C. Meine was present as an observer.

Also present at the hearing were Mr. Walter Van Deren of Dillon, Montana, and Mr. Bob Meine, also of Dillon, Montana. Each of the above requested to be made formal Objectors herein. Pursuant to the discretion lodged in the Hearing Examiner, both requests were granted.

As required by law, the Hearing Examiner hereby makes the following Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order to the Administrator of the Water Resources Division, Department of Natural Resources and Conservation:

PROPOSED FINDINGS OF FACT

1. On December 26, 1974, the Applicant, Mr. Garth Taylor, filed Application No. 4492-s41B with the Department of Natural Resources and Conservation seeking to appropriate a nonconsumptive flow rate of 1 cubic foot of water per second or 450 gallons



of water per minute and not to exceed five acre-feet per annum from an unnamed spring, a tributary of Murray Gilbert Slough, in Beaverhead County, Montana, to be impounded in a five acre-foot reservoir on said unnamed tributary at a point in the SW1/4 SE1/4 SE1/4 of Section 30, Township 6 South, Range 8 West, of the Montana Principal Meridian, and to be used for recreational, fishpond, and wildlife purposes from January 1 to December 31, inclusive, of each year.

2. On September 3, 1975, Mr. Carl J. Meine filed an objection to the above-described application alleging a prior water right with a first use priority date of October 1, 1895, for 400 miner's inches diverted from Murray Gilbert Slough from May 1 to October 15, at a point in the NE1/4 NE1/4 SW1/4 of Section 21, Township 6 South, Range 8 West, and used for irrigation on a total of 480 acres in the SE1/4 of Section 16, Township 6 South, Range 8 West, and the N1/2 of Section 21, Township 6 South, Range 8 West, from May 1 to October 15, and used for stockwatering of 500 head of stock year-round. Objector further alleged that there are no unappropriated waters in Murray Gilbert Slough, or in the unnamed springs feeding Murray Gilbert Slough, and that if granted, the proposed appropriation would adversely affect the Objector.

3. On September 3, 1975, Mr. Carl C. Meine filed an objection to the above-described application alleging a prior water right from Murray Gilbert Slough with first use priority

dates of October 1, 1895 and October 7, 1897, for a total of 300 miner's inches and 400 miner's inches respectively, diverted from May 1 to October 15, at a point in the NE1/4 NE1/4 SW1/4 of Section 21, Township 6 South, Range 8 West, and used for irrigation on 480 acres in the SE1/4 of Section 16, Township 6 South, Range 8 West from May 1 to October 15, and used for stock watering of 500 head of stock. The Objector further alleged that there are no unappropriated waters in Murray Gilbert Slough or in the unnamed springs feeding Murray Gilbert Slough, and if granted, the proposed appropriation would adversely affect the Objector.

4. At the hearing, Mr. T.J. Reynolds testified on behalf of the Department of Natural Resources and Conservation that pursuant to Mr. Reynolds' personal understanding, the Applicant intends to construct a 5-acre-foot reservoir for nonconsumptive recreational, fish, and wildlife purposes only, pursuant to the information supplied by the Applicant in the application. Mr. Reynolds testified that he is uncertain as to whether the reservoir was to be constructed on Murray Gilbert Slough, or on land adjacent to either of the above water sources as an offstream facility. The Applicant was not present to further elaborate. In response to a question posed by the Hearing Examiner, Mr. Reynolds testified that the application did not specify when the Applicant intends to initially fill the reservoir, i.e., when the Applicant



intends to appropriate a consumptive quantity of water. Mr. Reynolds further testified that there are no Department of Natural Resources and Conservation records as to the flow either in the unnamed tributary to Murray Gilbert Slough, or in Murray Gilbert Slough itself. Mr. Reynolds testified that there is frequently water diverted from the Beaverhead River into the Murray Gilbert Slough for use at points below the Applicant's proposed facility. Mr. Reynolds testified that Murray Gilbert Slough is a decreed stream, and introduced into evidence a copy of the Department records regarding water rights on Murray Gilbert Slough. Mr. Whelan testified that various of his clients' claimed decreed rights appear merely as filed rights in Department Exhibit No. 1 because such rights were filed prior to the adjudication of Murray Gilbert Slough. However, Mr. Whelan testified that such filed use rights were recognized as valid and were taken into account in the various subsequent adjudications of Murray Gilbert Slough, and consequently do in fact amount to decreed rights. Mr. Reynolds additionally testified that below the point where the Murray Gilbert Slough and the Selway Slough join, the two sloughs are jointly referred to as the Albers Slough.

5. Mr. Carl J. Meine testified that he owns the N1/2 of Section 21, the SE1/4 of Section 16, and all of Section 15,

all in Township 6 South, Range 8 West, of the Montana Principal Meridian. Mr. Meine testified that he possesses a 300-miner's-inch water right to water from Murray Gilbert Slough first appropriated by Gerhard Albers on October 7, 1897; a 400-miner's-inch water right to water from Murray Gilbert Slough first appropriated by Conrad Meine on October 1, 1895, for use in Section 21, Township 6 South, Range 8 West; and a 200-miner's-inch or 5-cubic-foot-per-second water right to water from Murray Gilbert Slough first appropriated by Charles F. Meine on June 13, 1903, for use in the SW1/4 of Section 16, Township 6 South, Range 8 West. Mr. Meine testified that the water appropriated pursuant to these three water rights is utilized for pasture and hayland irrigation and for stockwatering. Mr. Meine testified that he generally irrigates from mid or latter April into October. Mr. Meine testified that there is no substantial period of spring runoff, and that the flow in Murray Gilbert Slough is insufficient for existing water rights throughout the entire irrigation season. Mr. Meine further testified that the amount of water present in Murray Gilbert Slough decreases throughout the irrigation season. Mr. Meine testified that based upon a flowmeter measurement made by a Bureau of Reclamation representative in late June or early July of 1975, there was a flow of 700 miner's inches



present in Murray Gilbert Slough at a point in Section 21, Township 5 South, Range 8 West, just below one of Mr. Meine's points of diversion. Mr. Meine indicated that he presently has one point of diversion below this point of measurement. Mr. Meine testified that at such time there was insufficient water in Murray Gilbert Slough to satisfy his own water right in the Albers Slough, into which Murray Gilbert Slough flows. Mr. Meine later testified that at such time the Albers Slough was completely dry. Mr. Meine also testified that it is possible that at such time as the above-described measurements were made, water was being added to Murray Gilbert Slough from the Beaverhead River or from another drainage for use below the points in question herein. Mr. Meine testified that the addition of flow to the Murray Gilbert Slough, for use downstream is a common practice. Mr. Meine testified that his rights in the Albers Slough constitute one-third of its total flow. Mr. Meine testified that there is at no point during the irrigation season sufficient water in Murray Gilbert Slough to satisfy existing water rights, and that it has been necessary for users in the source of supply to cooperatively alternate use pursuant to an informal scheduling scheme. Mr. Meine testified that at least once, the Madison County District Court held against an appropriator, from the source of supply, refusing to award the appropriator 900 miner's inches based upon the Court's finding that there was no avail-

able water in the source of supply. At the request of the Hearing Examiner, Mr. Meine and Mr. Whelan agreed to document the above allegation and submit such documentation into evidence herein. However, no such documentation was received. Mr. Meine testified that Murray Gilbert Slough is a deteriorating water supply in that subdivisions are encroaching upon springs in the source of supply. Mr. Meine additionally testified that upstream users are now sprinkling so as to decrease return flows into the basin. Mr. Meine testified that there is no unappropriated available water in Murray Gilbert Slough, and that his present water rights would be adversely affected if the permit is granted. Mr. Meine challenged the nonconsumptive nature of the proposed appropriation on the grounds that presently the unnamed tributary of Murray Gilbert Slough which the Applicant herein seeks to appropriate flows through a culvert pipe under the Morton Ditch (which he testified does not flow into the Murray Gilbert Slough) before reaching the Murray Gilbert Slough. Mr. Meine testified that in addition to there being an increased evaporation loss pursuant to the proposed appropriation, percolation and seepage would be lost, since percolation and seepage will not necessarily flow through the culvert / <sup>under</sup> the Morton Ditch but rather would be intercepted by the Morton Ditch prior to reaching the Murray Slough. Mr. Reynolds testified that such seepage loss into the Morton Ditch is unlikely, but Mr. Reynolds testified that he could not entirely deny the possibility of such seepage loss



occurring. The Applicant was not present, and consequently could not be questioned as to the likelihood of the above, or as to steps which might be taken to prevent it.

6. Mr. Bob Meine testified that the Morton Ditch constitutes his primary source of irrigation water, but that he can divert water into the Murray Gilbert Slough and divert it downstream for use on irrigation in the NE1/4 of Section 16, Township 6 South, Range 8 West. Mr. Meine testified that this has been done since "long before he can remember." Mr. Meine also testified that the drainage constitutes a deteriorating water supply, and that there is at no point during the irrigation season sufficient water to satisfy his present water rights, without cooperation and scheduling between himself and the other present users in the area. Mr. Meine testified that he is entitled to two-thirds of the water in the Morton Ditch. Mr. Meine testified that he is entitled to an unspecified amount of water from the Albers Slough, for use on irrigation in Section 16 and in Section 21, both in Township 6 South, Range 8 West, from early April to mid-October (testimony was previously introduced to show that the Murray Gilbert Slough is a tributary of the Albers Slough).

7. Mr. Van Deren testified that his primary sources of water are the Beaverhead River and the Albers Slough. Mr. Van Deren testified that he is entitled to approximately 1,700 miner's inches of water from the Albers Slough for irrigation of over 2,000 acres. Mr. Van Deren testified that these claimed

water rights are of a decreed status and have priority dates from 1870 for 300 miner's inches, from 1876 for 400 miner's inches, from 1888 for 100 miner's inches, from 1891 for 500 miner's inches, and from 1897 for 400 miner's inches, all pursuant to decrees entered in the name of Gerhard Albers. Mr. Van Deren testified that the land to which these water rights is supplied is used for hayland and pasture, and that the maximum irrigation season extends from early April to mid-October of each year. Mr. Van Deren testified that at no time during the irrigation season is there sufficient water to fill his decreed rights, and that only through cooperative scheduling between himself and all other users in the source of supply, is it possible to irrigate at all.

8. Mr. Whelan testified that he believes that there is water available from a local ditch company which could be purchased by the Applicant, and which could be used by the Applicant for his proposed purposes herein.

9. Mr. Whelan testified that the Applicant's allegation of a nonconsumptive use does not mean that there will not necessarily be any water loss, that any water loss would adversely affect the Objectors, and that the term "any" includes water loss due to increased water evaporation and due to percolation and seepage as described and testified to above.

From the foregoing Proposed Findings of Fact, the following Proposed Conclusions of Law are hereby made:

PROPOSED CONCLUSIONS OF LAW

1. Under the provisions of Section 89-880, R.C.M. 1947, a



permit is required to appropriate water from an unnamed tributary to Murray Gilbert Slough.

2. There are at times unappropriated water in the source of supply. Such times occur principally during the nonirrigation season from October 16 to March 31, inclusive, of each year.

3. There are at times no unappropriated water in the source of supply. Such times occur principally during the irrigation season from April 1 to October 15, inclusive, of each year.

4. Valid prior water rights of prior appropriators of water from the source of supply must, by statute, be protected from adverse effects.

5. The rights of prior appropriators will be protected if the permit is conditioned to protect those rights from adverse effect.

6. An adverse effect and a consumptive use may result even though the use applied for is alleged in the application to be a nonconsumptive use.

7. The Objectors presenting evidence at the hearing appear to have valid rights in the source of supply which must be protected.

8. Modification of Applicant's proposal, specifically by allowing the requested appropriation only during the period of October 16 to March 31, inclusive, of each year, and by allowing no appropriation by the Applicant pursuant to this permit from the period April 1 to October 15, inclusive, of each year, may

reduce the desirability of proceeding with the project but will ensure that the valid rights of prior appropriators will be protected from adverse effects.

9. The proposed means of diversion is adequate.

10. The proposed use of the water constitutes beneficial use.

11. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

12. The Application for Beneficial Water Use Permit should be granted in accordance with the provisions of Chapter 8, Title 89, of the Revised Codes of Montana.

13. Nothing decided herein has bearing on the status of water rights claimed by the Applicant, other than those herein applied for, nor does anything decided herein have bearing upon the status of claimed rights of any other party, except in relation to those rights applied for herein, to the extent to reach a conclusion herein.

Based upon the above proposed Findings of Fact and Proposed Conclusions of Law, the following Proposed Order is hereby made:

PROPOSED ORDER

1. Subject to the modifications, limitations, and the conditions imposed below, the Applicant's Provisional Permit is hereby granted allowing the appropriation of a flow rate of no more than 1 cubic foot of water per second or 450 gallons



of water per minute and not to exceed a total of 5-acre-feet per annum from an unnamed spring, a tributary of Murray Gilbert Slough, in Beaverhead County, Montana, from October 16 to March 31, inclusive, of each year. Said appropriation is to be impounded in a 5-acre-foot reservoir on said unnamed tributary at a point in the SW1/4 SE1/4 SE1/4 of Section 30, Township 6 South, Range 8 West, of the Montana Principal Meridian, and used for only recreational, wildlife, and if feasibly beneficial, for fishpond purposes from January 1 to December 31, inclusive, of each year.

2. Water may not be appropriated pursuant to this permit during the irrigation season from April 1 to October 15, inclusive, of each year.

3. The permit is granted subject to all apparent prior existing water rights in the source of supply.

4. At the discretion of the Department of Natural Resources and Conservation, the Applicant shall install and maintain adequate measuring and flow-control devices to enable the Applicant to control and keep a record of all quantities of water diverted and returned, as well as the periods of such diversion and return. Such records shall be presented to the Department for inspection upon demand by the Department.

5. The Applicant shall specifically install and maintain adequate drainage devices so as to enable complete drainage of the reservoir into the main channel of the unnamed tributary of the Murray Gilbert Slough at a point as close as possible

to the original point of diversion.

6. This permit, granted in modified form only, is subject to any final determination of prior existing water rights in the source of supply as provided for by Montana Law. Violation of any of the terms and conditions imposed herein shall constitute grounds to void the permit in its entirety.

NOTICE

This is a Proposed Order and will not be final until accepted by the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation. Written exceptions to the Proposed Order, if any, shall be filed with the Department within ten (10) days of service upon the parties herein. Upon receipt of any written exceptions, opportunity will be provided to file briefs and to make oral arguments before the Administrator of the Water Resources Division.

DATED this 5<sup>th</sup> day of April, 1976.



RICHARD GORDON  
HEARING EXAMINER

CASE # 4492